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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

KAREN CORGIAT,

Plaintiff and Appellant,

v.

STANISLAUS COUNTY SUPERIOR COURT, et al.,

Defendants and Respondents.

F064200

(Super. Ct. No. 667366)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Duane Martin, Judge. (Retired Judge of the San Joaquin County Sup. Ct. assigned by the Chief Justice pursuant to article VI, § 6 of the Cal. Const.)

Law Offices of Daniel L. Mitchell and Daniel L. Mitchell for Plaintiff and Appellant.

Renne Sloan Holtzman Sakai, Timothy G. Yeung, Steve Cikes, and Steven P. Shaw, for Defendants and Respondents.

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Plaintiff appeals from a judgment entered after defendants' demurrer to her complaint was sustained without leave to amend on the ground she failed to file opposition or appear at the hearing to oppose the demurrer. We consider the merits of the

demurrer, and conclude it was properly sustained, but leave to amend should have been granted.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, a former employee of the Stanislaus County Superior Court, filed a complaint against the court and three of its employees, alleging they discriminated against her based on physical and mental disability, retaliated against her for complaining about that discrimination, harassed her, and wrongfully constructively terminated her employment. The pleading presented four causes of action: (1) employment discrimination and retaliation under 42 United States Code sections 1981 and 1988,[1] (2) employment discrimination, retaliation, harassment, and wrongful termination under sections 1981, 1983, and 1988, (3) breach of contract under sections 1981 and 1988, and (4) breach of the implied covenant of good faith and fair dealing under sections 1981 and 1988. The second cause of action was alleged against all defendants; the others were alleged only against the court. Defendants demurred to the complaint and all of its causes of action, setting a hearing for September 22, 2011. Plaintiff filed no opposition to the demurrer. On September 13, 2011, the trial court recused itself from hearing any proceedings in the matter. The demurrer was heard on October 12, 2011, by Judge Duane Martin, a retired judge of the San Joaquin County Superior Court. After an unreported hearing at which plaintiff did not appear, the trial court sustained the demurrer without leave to amend and entered judgment in favor of defendants. The order reflects that, because plaintiff did not oppose the demurrer, attend the hearing, or explain her failure to do so, the trial court considered her lack of response to be an admission of the demurrer's merit. Because plaintiff did not appear and demonstrate how the complaint

[1] Subsequent statutory references are to 42 United States Code, unless otherwise indicated.

could be amended to avoid the deficiencies asserted in the demurrer, the trial court sustained the demurrer without leave to amend. Plaintiff appeals the judgment.

DISCUSSION

I. Standard of Review

We review de novo the sustaining of a general demurrer without leave to amend, to determine whether the complaint contains sufficient facts to state a cause of action. (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497 (*Hernandez*).) We accept as true all properly pleaded material facts, but not contentions, deductions or conclusions of fact or law. (*Aubry v. Tri-City Hospital Dist*. (1992) 2 Cal.4th 962, 967.) We reverse only if the facts alleged would entitle plaintiff to relief under any possible legal theory. (*Hernandez, supra*, at p. 1497.)

"'A demurrer is directed to the face of a complaint [citation] and it raises only questions of law [citations].… [W]e review the validity of the ruling and not the reasons given.'" (*Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1396-1397 (*Alfaro*).) Thus, regardless of the trial court's stated grounds, if the ruling was correct on any ground, we will affirm.

When a demurrer is sustained without leave to amend, we review the denial of leave to amend for abuse of discretion. (*Hernandez, supra*, 49 Cal.App.4th at p. 1497.) When a demurrer to the original complaint is sustained, unless the complaint shows on its face that it is incapable of amendment, denial of leave to amend constitutes an abuse of discretion. (*Consolidated Fire Protection Dist. v. Howard Jarvis Taxpayers' Assn.* (1998) 63 Cal.App.4th 211, 219 (*Consolidated*); *McDonald v. Superior Court* (1986) 180 Cal.App.3d 297, 303-304 (*McDonald*).)

II. Notice of Hearing

Plaintiff asserts that, after the demurrer hearing, but before the formal judgment was entered, plaintiff's counsel sent a letter to defense counsel objecting to the proposed order and judgment defendants had served. One of his objections was that he had not

received notice that the demurrer would be heard on October 12, 2011, before Judge Martin, so plaintiff had no opportunity to "accept or reject Judge Martin as the trial Judge" or to "file her opposition consistent with the hearing date." In her briefs, plaintiff mentions this purported lack of notice, but does not make any organized argument, supported by citation to authority, that it invalidates the judgment or affects it in any way.

An appellate brief must: "[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority." (Cal. Rules of Court, rule 8.204(a)(1)(B).) Failure to present an issue as a distinct assignment of error with a separate heading and analysis is grounds to deem the argument waived. (*Roe v. McDonald's Corp.* (2005) 129 Cal.App.4th 1107, 1114.) Additionally, an issue raised without any argument or authority requires no discussion. (*Ibid.*) Because plaintiff has not properly presented it in her briefs, any issue regarding lack of notice of the hearing date is deemed waived.[2]

III. The Trial Court's Grounds for Sustaining the Demurrer

The trial court stated that its basis for sustaining the demurrer without leave to amend was plaintiff's failure to file opposition or appear at the hearing, which it deemed an admission of the merits of the demurrer, and her consequent failure to show her ability to amend to cure the defects. Failure to appear in opposition is not a proper ground for sustaining a demurrer.

Code of Civil Procedure section 430.10 sets out the grounds on which a party may demur. Generally, these grounds address defects appearing on the face of the pleading; the trial court considers the facts alleged in the pleading and determines whether they are

[2] We note that plaintiff only contends she did not receive notice that the hearing date had been changed. She does not contend that she was not properly served with the demurrer or was not made aware of the original hearing date. She does not dispute that, prior to the continuance of the hearing date, she failed to timely file written opposition to the demurrer in accordance with the original hearing date.

sufficient as a matter of law. (Code Civ. Proc., § 430.30; *Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 316.) "A court sustaining a demurrer without leave to amend is required to state 'the specific ground or grounds upon which the decision or order is based ….' [Citation.] The grounds for a demurrer are those listed in Code of Civil Procedure section 430.10 …. A court sustaining a demurrer is required to state the specific grounds for its decision." (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 111 (*Fremont*).) Thus, the demurrer must be sustained on one of the nine grounds set out in Code of Civil Procedure section 430.10.

"When a demurrer is regularly called for hearing and one of the parties does not appear, the demurrer must be disposed of *on the merits* at the request of the party appearing unless for good cause the hearing is continued. Failure to appear *in support* of a special demurrer may be construed by the court as an admission that the demurrer is not meritorious and as a waiver of all grounds thereof. …" (Cal. Rules of Court, rule 3.1320(f), italics added.) Under this rule, if the party against whose pleading the demurrer is asserted fails to appear at the hearing, the demurrer must be heard and determined on the merits. If the demurring party fails to appear at the hearing, the trial court may consider any special demurrer to be waived. Rule 3.1320(f) does not authorize the trial court to consider the nonappearance of the nonmoving party to be an admission of the validity of the demurrer; rather, it requires the trial court to consider the challenged pleading, which is before the court, and to determine its sufficiency on the merits.

Because a demurrer raises only issues of law, we may affirm or reverse the trial court's ruling on any ground stated in the demurrer; "'we review the validity of the ruling and not the reasons given.'" (*Alfaro, supra,* 171 Cal.App.4th at pp. 1396-1397; *Fremont, supra,* 148 Cal.App.4th at p. 111.) Therefore, we consider the arguments raised by the demurrer on the merits to determine whether it was properly sustained.

IV. Merits of demurrer

The demurrer presented the following arguments:

1. The first cause of action for violation of section 1981 is barred because that section applies only to claims involving race discrimination.

2. The second cause of action fails because:

   a. it does not allege an underlying violation of a federal statutory or constitutional right that may be remedied through a suit under section 1983.

   b. it is not alleged against the individual defendants with the required specificity.

   c. neither the state nor its officials acting in their official capacities are persons subject to liability for damages under section 1983.

3. The third and fourth causes of action are based on contract and they fail because public employment is based on statute, not contract.

4. The entire complaint is uncertain for various reasons.

A. First cause of action: violation of section 1981

Section 1981, subdivision (a), provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." Section 1981 protects the right "to make and enforce contracts and purchase both personal and real property without any impairment due to private or public racial discrimination. A plaintiff establishes a prima facie case under § 1981 by showing (1) membership in a protected class; (2) the intent to discriminate on the basis of race on the part of the defendant; and (3) discrimination interfering with a protected activity (i.e., the making and enforcement of contracts)." (*Daniels v. Dillard's, Inc*. (2004) 373 F.3d 885, 887.) An action under section 1981 must be based on allegations of racial discrimination; no cause of action under that section is stated when

only disability discrimination is alleged. (*Aramburu v. The Boeing Co.* (10th Cir. 1997) 112 F.3d 1398, 1411.)

Plaintiff's first cause of action alleges it is "for discrimination, retaliation, harassment, wrongful termination in employment because of plaintiff's physical and mental disability." She alleges she sought accommodation for job related injuries and stress; "she was subjected to intentional differential treatment and intentional criticism about her physical and mental disability." Additionally, "[p]laintiff, because of her physical and mental disability was subjected to strict medical reporting including a requirement to report in advance of an illness; reporting restrictions to which no other employee was subjected in the employment setting." Her protests to the court and to her superiors were ignored. She was constructively terminated because of her disability, her complaints about how she was treated, her association with other employees, and her claims of discrimination and retaliation for voicing her complaints and demanding an accommodation for her injuries.

Plaintiff does not dispute that allegations of discrimination on the basis of disability fail to state a claim under section 1981. Rather, she asserts that a claim under the statute may be based on allegations of "association discrimination," that is, allegations that she was discriminated against based on association with a person of another race. She asserts that she is Caucasian, but her significant other is African-American, "which association was the subject of discriminatory animus." In *Johnson v. University of Cincinnati* (2000) 215 F.3d 561 (*Johnson*), the plaintiff, who was in charge of the defendant university's affirmative action program, sued the university and two individuals, alleging he was terminated because of his advocacy on behalf of minorities. He alleged a cause of action under section 1981. The court rejected the trial court's finding that the plaintiff was not a member of a protected class because his claims were premised only on his advocacy of minorities, and not his status as a minority member. (*Id*. at p. 573.) It cited various cases in which a plaintiff was permitted to proceed under

section 1981 or section 2000e-2, although he or she was not a minority member: where the plaintiff alleged he was discriminated against because he had a biracial child (*Tetro v. Popham* (6th Cir. 1999) 173 F.3d 988); where a woman alleged she was discriminated against because of her relationship with an African-American man (*Deffenbaugh-Williams v. Wal-Mart Stores, Inc*. (5th Cir. 1998) 156 F.3d 581); where a Caucasian man was allegedly discharged in retaliation for protesting the discriminatory firing of an African-American co-worker (*Winston v. Lear Seigler, Inc*. (6th Cir. 1977) 558 F.2d 1266); and where a white plaintiff was allegedly discriminated against because of her marriage to a nonwhite (*Alizadeh v. Safeway Stores, Inc.* (5th Cir. 1986) 802 F.2d 111). (*Johnson, supra*, 215 F.3d at pp. 574-575.)

Although it may be possible to allege a cause of action for violation of section 1981 by alleging discrimination based on association with a person of a different race, plaintiff's complaint does not do so. It uses the term "association" a number of times, but does not use it in the context of allegations of racial discrimination; it does not describe any sort of association that formed the basis for her allegations of discrimination, harassment, and retaliation. The complaint alleges plaintiff was discriminated and retaliated against, harassed, and wrongfully terminated "on account of her physical and mental disability and association." It also alleges she was terminated because of her disability and "her association with other employees," among other things. The complaint does not allege the facts plaintiff's reply brief suggests may form the basis of a claim: that she was discriminated against or harassed by defendants because her significant other is African-American. Consequently, the trial court's sustaining of the demurrer to the first cause of action was proper on this ground.[3]

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[3] We decline to address the argument, raised by defendants for the first time in their respondents' brief, that the first cause of action also fails because a claim under section 1981 must be remedied through an action under section 1983, and, as they argued in their demurrer to the second cause of action, defendants are not persons subject to

B. Second cause of action: violation of section 1983

1. Violation of a federal right

Section 1983 provides, in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State … subjects, or causes to be subjected, any citizen … to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…." Section 1983 is a remedial statute which does not create substantive rights. (*Chapman v. Houston Welfare Rights Organization* (1979) 441 U.S. 600, 617-618.) It provides a remedy for violation of federally protected rights, those derived from the Constitution or from other federal statutes. (*Maine v. Thiboutot* (1980) 448 U.S. 1, 5-6.)

The demurrer asserted that the second cause of action did not allege a violation of a federal statutory or constitutional right that may be remedied through a suit under section 1983; it argued the second cause of action attempted to allege a violation of section 1981, but that alleged violation was not actionable because it involved disability discrimination, rather than racial discrimination. In her briefs, plaintiff asserts that violations of the First Amendment, Fourth Amendment, or Fourteenth Amendment could serve as the substantive violations for which a section 1983 remedy is sought.

The complaint, however, does not allege violations of any constitutional amendments. To the extent the second cause of action relies on a violation of section 1981 as the predicate violation for which a remedy is sought, it duplicates the first cause of action. As discussed previously, the first cause of action fails because it alleges only

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liability under section 1983. The parties' briefs do not adequately address whether section 1981 gives rise to a private right of action that may be maintained without reference to section 1983.

disability discrimination, and not racial discrimination. Consequently, the second cause of action fails to state a cause of action, and the demurrer to it was properly sustained.

2. "Persons"

The demurrer to the second cause of action was also properly sustained because the court and its personnel, acting in their official capacities, are not "persons" who may be held liable under section 1983. States and governmental entities that are considered arms of the state are not persons within the meaning of section 1983. (*Will v. Michigan Department of State Police* (1989) 491 U.S. 58, 64, 70 (*Will*); accord, *Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 829.) Further, state officials acting in their official capacities are not persons for purposes of section 1983. "[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. [Citation.] As such, it is no different from a suit against the State itself." (*Will, supra,* 491 U.S. at p. 71.)

California courts are arms of the state. (Cal. Const., art. VI, § 1; *Greater Los Angeles Council on Deafness v. Zolin* (9th Cir. 1987) 812 F.2d 1103, 1110; *Sacramento and San Joaquin Drainage Dist. v. Superior Court* (1925) 196 Cal. 414, 432.) Thus, defendant superior court is not a person against whom a section 1983 claim may be alleged. Further, to the extent the individual defendants are sued in their official capacities, they also are not persons against whom liability may be imposed under section 1983.

3. Claims against individual defendants

Under California law, statutory causes of action must be pleaded with particularity. "'Every fact essential to the existence of statutory liability must be pleaded.'" (*Richardson-Tunnell v. Schools Ins. Program for Employees* (2007) 157 Cal.App.4th 1056, 1061.) Additionally, "any complaint for damages in any civil action brought against a publicly elected or appointed state or local officer, in his or her individual capacity, where the alleged injury is proximately caused by the officer acting

under color of law, shall allege with particularity sufficient material facts to establish the individual liability of the publicly elected or appointed state or local officer and the plaintiff's right to recover therefrom." (Gov. Code, § 951.)

A claim under section 1983 against a state official may be stated if the official is sued in his or her individual capacity. A state official may be sued in his or her individual capacity as a person subject to section 1983 liability even when he or she is carrying out government functions. (*Gean v. Hattaway* (6th Cir. 2003) 330 F.3d 758, 766.) "Personal liability against a state official can be established under § 1983 by showing 'that the official, acting under color of state law, caused the deprivation of a federal right.'" (*Ibid*.) "A supervisor can be liable in his individual capacity 'for his own culpable action or inaction in the training, supervision, or control of his subordinates; for his acquiescence in the constitutional deprivation …; or for conduct that showed a reckless or callous indifference to the rights of others.'" (*Watkins v. City of Oakland* (9th Cir. 1998) 145 F.3d 1087, 1093.)

The second cause of action against the individual defendants does not expressly allege whether they are being sued in their official or in their individual capacities. The complaint generally alleges that the named defendants "were the agents, servants, and employees of each of the other defendants … and at all times herein mentioned were acting within the course and scope of said agency and employment"; the individual defendants "were and are the agents and/or employees of SCSC, and said individual defendants were supervisory to plaintiff." The complaint alleges plaintiff was constructively terminated by the court, through the individual defendants; the individuals subjected her to "intentional differential treatment and intentional criticism about her physical and mental disability," knew or should have known of the hostile work environment, and ignored plaintiff's protests of her treatment. Because plaintiff does not allege that she is suing the individual defendants in their individual capacities, and include specific facts demonstrating conduct of the individuals that would form a basis

for that liability, she has not alleged every fact essential to the existence of liability under section 1983. She has not alleged facts showing that the individual defendants are persons for purposes of that statute. Consequently, the demurrer to the second cause of action against the individual defendants was properly sustained.

C. Third and fourth causes of action: contract claims

"[I]t is well settled in California that public employment is not held by contract but by statute and that, insofar as the duration of such employment is concerned, no employee has a vested contractual right to continue in employment beyond the time or contrary to the terms and conditions fixed by law." (*Miller v. State of California* (1977) 18 Cal.3d 808, 813 (*Miller*).) The terms and conditions of public employment are determined by law; the controlling statutory provisions may not be circumvented by purported contracts in conflict with them. (*Id*. at p. 814; *Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1690.)

Recently, however, the California Supreme Court has "caution[ed] that our 'often quoted language that public employment is not held by contract' has limited force where, as here, the parties are legally authorized to enter (and have in fact entered) into bilateral contracts to govern the employment relationship." (*Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1182.) In *Retired Employees Association*, the county had negotiated and approved memoranda of understanding (MOUs) with its employee bargaining units. The court observed: "'When agreements of employment between the state and public employees have been adopted by governing bodies, such agreements are binding and constitutionally protected.'" (*Ibid*.) Further, "'all modern California decisions treat labor-management agreements whether in public employment or private as enforceable contracts [citation] which should be interpreted to execute the mutual intent and purpose of the parties.'" (*Id*. at p. 1183.)

Plaintiff asserts she has actionable contract rights as a third party beneficiary of the MOU between the court and the union. The third cause of action quotes the relevant

provision of the MOU: "The parties agree to recognize, respect, and support the Court's commitment to nondiscrimination in employment as set forth in Chapter 7 of the Personnel Organization and Rules Manual." The complaint also quotes chapter 7 of that manual: "It is the policy of the Superior Court that invidious discrimination and harassment are unacceptable behaviors and will not be tolerated in the workplace or in a work-related situation based on an individual's … physical disability, mental disability, … or any basis protected by law, or based on a perception that an individual has any of these characteristics, or based on a perception that an individual is associated with a person who has, or is perceived to have, any of these characteristics." While an MOU may contain binding contractual promises, the provisions quoted by plaintiff appear to be merely general statements of policy, rather than binding contractual promises that may give rise to a breach of contract cause of action.

The covenant of good faith and fair dealing is an implied term of every contract. Consequently, the existence of a contract between the parties is a prerequisite to the maintenance of a cause of action for breach of the covenant. (*Kim v. Regents of University of California* (2000) 80 Cal.App.4th 160, 164.) Plaintiff has not adequately alleged a contract imposing on the court the obligations she contends were breached or giving rise to an implied covenant of good faith and fair dealing that would impose those obligations. Consequently, the demurrer to her causes of action for breach of contract and breach of the covenant of good faith and fair dealing was properly sustained.

V. Leave to amend

"Where a demurrer is sustained … as to the original complaint, denial of leave to amend constitutes an abuse of discretion if the pleading does not show on its face that it is incapable of amendment." (*Consolidated, supra,* 63 Cal.App.4th at p. 219.) This is true irrespective of whether plaintiff requested leave to amend. (*McDonald, supra,* 180 Cal.App.3d at pp. 303-304.) It does not appear plaintiff can state a viable cause of action against the court under section 1983 (the second cause of action), because it is not a

person for purposes of that statute. As to the other causes of action, including the second cause of action against the individual defendants, it is not clear that plaintiff cannot amend to state a viable cause of action. Accordingly, we find the denial of leave to amend on those causes of action to be an abuse of discretion.

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court with directions to vacate the order sustaining the demurrer without leave to amend and to enter a new and different order sustaining the court's demurrer to the second cause of action without leave to amend and sustaining the demurrer to the remaining causes of action, including the individual defendants' demurrer to the second cause of action, with leave to amend. The parties shall bear their own costs on appeal.

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Gomes, J.

WE CONCUR:

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Wiseman, Acting P.J.

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Peña, J.